In the Exchequer Chamber, May, 1857.

ROBERTS *vs.* SMITH AND ANOTHER.[1]

The defendant, a master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the defendant were in bad condition. The workman broke several of the putlogs, (the pieces of wood between the wall and the upright poles), but was ordered by the defendant not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs:—Held, in an action by B. to recover compensation for the injuries received, that there was evidence to go to the jury in support of the plaintiff's case, and that such evidence ought to have been left to the jury.

This case came before the court by way of appeal from the Court of Exchequer. The declaration stated, that before and until and at the respective times of the plaintiff entering into the service of the defendants, and the committing of the grievances hereinafter mentioned, the defendants carried on the business of carpenters and builders; and thereupon the plaintiff, being a bricklayer, entered and was received, and until the time of the said grievances remained and continued in the service and employ of the defendants, in the way of their said trade, upon the terms and conditions, amongst others, that the defendants should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable and unnecessary risk or danger from happening or occurring to the plaintiff in the performance of his duty as such servant of the defendants; and although the plaintiff did all things, and all things concurred and happened, which were necessary to entitle him to have the said terms and conditions performed by the defendants, yet the defendants did not take or use such due or reasonable or proper means or precautions as aforesaid, but altogether omitted so to do; and by reason thereof, and of the default and neglect of duty of the defendants in that behalf, the

[1] Appeal from the Court of Exchequer. 21 Jur. 469.

plaintiff was directed and employed by the defendants, as such their servant as aforesaid, to perform certain work upon the wall of a house, and for that purpose to be and remain at a great height from the ground, upon a certain scaffold affixed to such house, and which scaffold, for want of the use of such means and precautions as aforesaid, and by reason of the negligence and default of the defendants in that behalf, then was and remained constructed very unsafely and insecurely, and in such a defective, rotten, and improper state and condition as to render it dangerous to be and remain upon the same for the purpose of doing the said work, which the defendants then well knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof, whilst the plaintiff was so engaged as aforesaid, a part of the said scaffold broke and gave way, and the plaintiff was precipitated and fell to the ground with great violence. [Then followed a description of the injury.] The defendants pleaded —first, not guilty; secondly, that the plaintiff was not employed on the terms and conditions and in manner in that behalf in the declaration alleged. At the trial, which took place before the Lord Chief Baron at Westminster on the 29th November, 1856, the following evidence was given on behalf of the plaintiff. The plaintiff proved that he was engaged by one White to go into the employ of the defendants; that he was sent to the house, and that while he was upon the scaffold doing his work the scaffold broke; he fell to the ground and broke his thigh: that the putlog broke. In cross-examination he stated—"White engaged me. My attention was not directed to the state of the putlog; it was under the board upon which I was standing. The man who built the scaffold knew well how to do it. The putlog rested on the window-sill." John Nellegan was examined, and swore—"I am a laborer. I was employed to get the scaffolding out of Mr. Smith's yard to erect the same. It is usual to examine the poles, &c. I examined the materials; I found them in bad condition, light, and worm-eaten. I broke several that were rotten and worm-eaten. William Smith came afterwards; he asked me who broke the putlogs. I told him I did. He then told me I had no business to do so, and said, 'They will do very well, as there was no bricks or mortar going on.' He said,

'Don't break any more.' I put aside such as I thought sound. I was not there when the accident happened. I used three putlogs where one would have done. I have been a laborer and scaffolder for twenty-five years. A sound putlog ought to bear from 15 cwt. to 1 ton, or twenty men. The putlogs appeared as if they had got the rot." Other evidence was given to the same effect. At the conclusion of the plaintiff's case it was objected that there was no evidence to go to the jury; and on that ground the Lord Chief Baron directed a nonsuit, with liberty to the plaintiff to move for a new trial if there was evidence to go to the jury. A rule was afterwards obtained by the plaintiff, calling upon the defendants to show cause why the nonsuit entered on the trial, and the judgment signed thereon, if any, should not be set aside, and a new trial had, on the grounds that there was evidence for the jury in behalf of the plaintiff's case, and that the evidence ought to have been left to the jury for them to decide upon it. It was agreed between the plaintiff's and the defendants' counsel, in order that the plaintiff might appeal, that the rule should be discharged by the Court of Exchequer; and it was against this ruling by such arrangement that this appeal was brought.

Temple, (*C. Wray Lewis* with him), for the plaintiff.—There was evidence here to show negligence on the part of the defendants themselves, and the Chief Baron was wrong in not leaving that evidence to the jury. The accident was caused by the breaking of the putlogs. There was evidence to go to the jury upon which the plaintiff would be entitled to a verdict; but if there was any evidence, that would be sufficient. It is not intended to dispute the correctness of the decisions in *Hutcheson* vs. *Yorke*, 19 L. J., Ex., 296, and *Priestley* vs. *Fowler*, 3 M. & W. 1, for those cases are not conclusive upon the point raised in the present case. *Paterson* vs. *Wallace*, 1 Macq. 748, is in point. In that case an action was brought upon the ground that the deceased had lost his life by reason of the masters' negligence, through their agents having carelessly left a very large stone upon the roof of a mine in so dangerous a position that it fell upon the workman, when engaged in digging out the coal, and killed him upon the spot. Evidence was given to

show that the deceased and the other men employed in the mine had pointed out to the underground manager of the mine that the roof was in a very dangerous position; that he made some answer intimating that there was no danger, but that he afterwards sent some persons down to remove the stone. Before this was done, however, it fell, and killed the deceased. The Lord Chancellor Lord Cranworth said, "Now, in order to recover damages, the family must establish two propositions: first of all, they must show that the stone was in a dangerous position, owing to the negligence of the masters; and next, that the workman whose life was forfeited, lost it by reason of that negligence, and not by reason of rashness on his own part." And again—"It was not for the court below, nor is it for your Lordships, to say what would have been the conclusion at which the jury would have arrived, or ought to have arrived, upon the evidence. The question for the court below and for the House is this—was there evidence that might by possibility justly have led the jury to come to a conclusion in favor of the plaintiffs upon both the propositions to which I have adverted?" And again—"The question is, what ought to have been said by the judge to the jury after the evidence had been given? It was his duty to point out to them the evidence which bore upon the two propositions, namely, whether there had been a want of timeous removal, as they call it, upon the part of the masters, and whether they were satisfied that Paterson came by his death, not by reason of his own rashness, but by reason of his having so implicitly relied upon the assurances which were given him by the underground agent." *Brydon* vs. *Stewart*, 2 Macq. 30. In the marginal note is—"A master is bound to take all reasonable precautions to secure the safety of his workmen. It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine, which was not in a safe and sufficient state, to say that he was at that moment of time in the act of leaving the work for a purpose of his own." Lord Brougham says, "the master is answerable for the state of his tackle, which in the present instance was defective, and had occasioned this lamentable accident." Upon the authority of these two cases it might be successfully con-

tended that the judgment of the court ought to be in favor of the appellant, without the evidence of Nellegan, but that witness gave evidence which was quite conclusive as to negligence on the part of the masters themselves. It is true that he used the best materials he could out of the stock of the masters, but the masters would not allow him to test any more of the putlogs, and were informed of the bad state in which they were.

Knowles, for the defendants.—The ruling of the Lord Chief Baron was correct. Where a workman enters into the employ of a master, the business being of such a description as that he will be aware that the master will not be personally employed in the erection of the building, but that his fellow-workman will be so, and an injury occurs to him in the course of his employment, the master is not responsible if he has used due care in choosing his workmen. COCKBURN, C. J.—Not only the workmen, but the materials also. No doubt he must employ servants who will look at the materials; and here it appears that Nellegan put aside such as appeared to him to be sound. The duty of the master does not go so far as is alleged in the declaration; though he employs an unfit person, he is not responsible if he has taken due care in choosing him. In *Seymour* vs. *Maddocks*, 16 Q. B. 326, it was alleged that the defendant had suffered the floor of his theatre to be insufficiently lighted, and a hole to be open without sufficient fence, so that the plaintiff, a performer, was injured by falling into the hole; and it was held, that the duty, a breach of which was laid, did not arise from the particular facts stated in the declaration, nor from the general relation of master and servant. WIGHTMAN, J.—If the allegations had been the same there as in this case there might have been a different construction of the matter. *Tarrant* vs. *Webb*, 18 C. B. 797, was a case in which an action was brought to recover damages for an injury sustained by the plaintiff from the falling of a scaffolding on which he was working in the employ of the defendant, a house decorator. JERVIS, C. J., said—"The rule is now well established that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. The master *may* be responsible where he is personally guilty of negligence, but certainly

not where he does his best to get competent persons. He is not bound to warrant their competency." Here the defendants have employed competent persons to do the work; they did not do it themselves, and cannot be held responsible for the result of the breaking of the scaffolding.

Temple was not called upon to reply.

PER CURIAM.—There was certainly evidence to go to the jury, and there must be judgment for the appellant.—*Judgment for the appellant for a new trial.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, December Term, 1856. By BENJAMIN C. HOWARD, Counsellor at Law. Vol. XIX, Washington: William M. Morrison & Co. 1857. pp. 662.

Charles Lamb once, when a child, after studying for some time the epitaphs in a crowded church-yard, innocently inquired "where all the bad people were buried?" A retrospect of the literary notices of this and other legal journals for a few years, has forced upon our minds a similar inquiry, "Who writes or publishes the bad law books?" Certainly such there must be, yet our memory turns back in vain over a dreary waste of goodness, and distracts us with the impossible excellence of all the authors, publishers and printers that have ever come under our notice. So invariably admirable have they been in everything, from text to type, that if Arcadia, too, had its lawyers and booksellers, from that stock must they have sprung. Even if a little rivalry has occasionally exhibited itself in law calf, between Menalcas and Damoetes, it did not disturb this pastoral happiness, for the ever amiable critic soon harmonized them with his equal praise, and declared to each,

"Et tu vitula dignus et hic,"

Of this monotony of perfection we, as editors, have some little right to complain. It has exhausted our stock of laudation. We have honored every draft on our praise, and now we have apprehensions lest our bank may be forced to suspend. Yet we have done our best. Every change has been rung on the accuracy, the fullness, the brevity, the clearness, the